U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904

TEL (757) 873-3099
FAX (757) 873-3634

Date: February 15, 2001

Case No.: **1998-LHC-2902**

OWCP No.: **5-100502**

In the Matter of:

BOBBIE L. SUTTON,
Claimant,
v.
COOPER/T. SMITH STEVEDORING,
Self-Insured/Employer,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.
and

Case No.: **1999-LHC-2321**

OWCP No.: **5-98867**

In the Matter of:

BOBBIE L. SUTTON,
Claimant,
v.
I.T.O. CORPORATION OF VIRGINIA,
Self-Insured/Employer,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

Representation: Gregory E. Camden, Esq.
For the Claimant

Christopher J. Field, Esq.
For I.T.O. Corporation

F. Nash Bilisoly, Esq.
For Cooper/T. Smith Stevedoring

Janet Dunlop, Esq.

For the Director (on brief)

Before: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers, Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia, on May 25, 2000 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

The Claimant and I. T. O. have stipulated to the

1. That an employer/employee relationship existed at all relevant times.

2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

3. That the claimant sustained an injury to his right knee on 5/17/96.

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[1] *The following abbreviations will be used as citations to the record:*

TR - Transcript of the Hearing;
CX - Claimant's Exhibits;
CTSX - Cooper/T. Smith Exhibit; and
ITOX - I.T.O. Corporation Exhibit.

4. That a timely notice of injury was given by the employee to the employer.

5. That a timely claim for compensation was filed by the employee.

6. That at the time of the injury the claimant's average weekly wage was $1,817.27 resulting in entitlement to payment based on the maximum compensation rate at the time of his injury which was $782.44.

7. The employer has paid the claimant for temporary total and permanent partial disability benefits as evidenced by Employer’s LS-208 dated 5/23/97, Employer’s Exhibit 3, and I. T. O. paid temporary total disability from June 11, 1996 through January 12, 1997.

   I. T. O. paid a 10% schedular award for leg impairment.

8. That the claimant's treating physician for this injury is Dr. Neff.

The claimant and Cooper/T. Smith have stipulated to the following:

1. That an employer/employee relationship existed at all relevant times.

2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

3. That the claimant sustained an injury on 1/20/97 to his right ankle and heel.

4. That a timely notice of injury was given by the employee to the employer.

5. That a timely claim for compensation was filed by the employee.

6. That at the time of the injury the claimant's average weekly wage was $1,817.27 resulting in entitlement to payment based on the maximum

compensation rate at the time of his injury which was $801.06.

7. The employer has paid the claimant temporary total and permanent partial disability benefits as evidenced by a form LS-208 dated December 21, 1998. (A copy was received in this office in December 2000). This form reflects payment of temporary total disability from January 21, 1997 to December 7, 1998.

8. That the claimant's treating physician for this injury is Dr. Arthur Wardell.

Issues

1. Whether the claimant has a work related back impairment.

2. Extent of disability.

3. Responsible employer.

4. Entitlement to Section 8(f) relief.

Evaluation of the Medical Evidence

At the hearing, the claimant testified that he dropped out of school when he was in the eighth grade at age 17. He loaded heavy freight for some 14 years and then worked in a Ford assembly plant for one year. Subsequently, he worked as a longshoreman for over 30 years.

Work as a longshoreman required handling cocoa beans, and driving a forklift and a hustler. He spent 75% of his time as a foreman (header) and 25% in other jobs. Even as a foreman (header) he had to climb ladders and assist in handling cargo. He also had to lash containers. [TR 25].

He had an automobile accident in 1995 and he was treated by Dr. Morales for leg and back problems. At I. T. O. in May 1996, his right knee struck a post and he went to Dr. Neff with knee and back complaints. Knee surgery was performed and

he returned to full duty in January 1997 although he still had back complaints. [TR 34].

On the fifth day of his work with Cooper/T. Smith in January, a forklift struck his right leg and foot. Dr. Wardell treated him for these problems and for complaints of back pain.

Sutton testified that presently he could not stand for very long due to back pain, and he indicated that his right leg would become numb. Sitting became uncomfortable after 20 minutes.

In mid-December 1995, Sutton informed Dr. Morales that ten days earlier his vehicle flipped, he was knocked unconscious, and he was hospitalized for observation. Sutton informed Dr. Morales that he now had

> dizziness, lightheadedness, ringing in his ears, headaches, neck pain, lacerations over the right posterior neck, numbness and tingling radiating into his left arm, severe low back pain and tenderness across the chest.
>
> Examination revealed healing abrasions on the head.
>
> There was a decreased range of motion of the cervical spine by about 30%. There are multiple healing lacerations, abrasions, and contusions about the left posterior neck and left upper back.
>
> There was a decreased range of motion of the lumbar spine by approximately 30%. There was bilateral paravertebral muscle spasm and positive straight leg raising bilaterally at 80 degrees.
>
> There were no knee injuries. He had patchy hypesthesia about the L5-S1 dermatomes bilaterally and he had a feeling of weakness in both legs.
>
> In early January 1996, Sutton reported that he still had low back pain. An MRI of the lumbar spine revealed no evidence of a bulging, protruding or herniated disc. [CX 9]. In late January, the physician stated that the claimant could return to work. [CX 10].

Reports from Now Care indicate that on May 17, 1996, Sutton reported that something gave way in his right leg. The impression was calf strain. [CX 13].

Dr. Neff, an orthopedic surgeon, found slight limitation of motion and some swelling of the knee in mid-June 1996. Examination in July revealed right buttock atrophy and an MRI showed tearing of the lateral meniscus. There was positive straight leg raising and the physician advised an MRI of the lumbar spine.

EMGs revealed slight abnormality in the right lower extremity. Sutton was referred to Dr. Richardson who conducted an EMG, and an MRI of the spine, which were considered to be normal [CX 7; ITOX 12 and 13]. In October, the claimant underwent repairs of the torn lateral meniscus. Dr. Neff scheduled physical therapy.

In November, the physician reported satisfactory results and advised a work hardening program. In mid-November, Dr. Neff noted that the conditioning program report indicated that Sutton could return to duty as a gang leader but not as a general longshoreman. On January 10, 1997, Dr. Neff stated that the claimant could return to work on January 13. [CX 4].

In November 1996, Sutton was referred to the Sports Therapy and Industrial Medical Center. Sutton was seen on numerous occasions and the last visit was on January 9, 1997. [CX 7].

Peter Owen testified that he was a physical therapist's assistant and a program coordinator for Sports Therapy. Sutton underwent a work hardening program for post operative meniscal surgery and right sciatica. [TR 137]. The program focused on the right knee and it was felt that he could climb ladders in January. Owen did not recall back complaints during the treatment. [See ITOX 18].

During treatment at Sentara Emergency on January 20, 1997, the claimant reported that a forklift struck his right heel. An x-ray was negative and Sutton was provided with a posterior splint and crutches. The impression was an acute right ankle contusion. [CX 12].

On January 22, 1997, the claimant informed Dr. Wardell that pain radiated from the right foot into the calf and into the posterior thigh. Impressions included possible right sciatica. This physician provided extensive treatment for the back in 1997. [ITOX 8; CX 3].

Dr. Neff evaluated Sutton's knee in February 1997, and in the next month the physician assigned a permanent rating of 10% for the right knee. Dr. Neff noted that Dr. Wardell was treating Sutton for other injuries. [ITOX 6].

July 1997 notes from Dr. Wardell's office indicate that Sutton underwent three epidural injections without relief and had similar results with physical therapy. An EMG and an MRI were considered to be negative. [ITOX 8].

In August 1997, Dr. Hynninen performed right L3-4, L4-5, and L5-S1 facet injections. [CX 8].

On September 22, 1997, Dr. Wardell noted moderate restriction of back flexion and some limitation of motion of the ankle. It was concluded that Sutton had reached maximum medical improvement but that he should remain out of work. [CX 3, ITOX 8].

In October 1997, Dr. Holden conducted an examination and reviewed medial records. The physician stated, in part

> Overall conclusions and summary: The patient's history is totally unreliable. One notes that from doctor to doctor the history changes and/or he cannot remember. There is also a concern that he tells me that he has never had a previous back injury when he had an automobile accident and had a back injury. It is also interesting to note that a pulling sensation in the back of the leg constantly surfaces back from the auto accident and Dr. Morales' notes to Dr. Neff's notes to Portsmouth Orthopaedic notes. It is also interesting to note that the patient's EMG studies that were performed within six weeks of the knee injury demonstrate chronic old nerve injury.
>
> The EMG studies that were done by Dr. Morales did not do anything but paralumbar muscles and so I believe that the EMGs done in Dr. Morales' office

> were incomplete and failed to divulge a nerve injury. Certainly atrophy of the buttock and polyphasics are the healing phase. Therefore, it is my conclusion that the patient did suffer sciatic nerve injury in the automobile accident of 12/8/95 and this was not diagnosed. His injury on 1/20/97 when he was trying to escape what he thought was a falling container could have exacerbated this nerve injury because of atrophy and weakness.
>
> My overall conclusions and summary are: Automobile accident of 12/8/95 which resulted in a back injury and a sciatic nerve injury which is undiagnosed. The sciatic nerve injury is then diagnosed on 6/18/96. It is my supposition that the reason he fell was because of the sciatic nerve injury which was undiagnosed, not the running. That led to a diagnosis of torn meniscus. However, the records do show that the patient's back was apparently doing well and that he had negative straight leg raising until he was hit by this wheel. However, the workup for that in terms of his back shows normal MRI findings and no acute “EMGs”. [CX 11].

In May 1998, Dr. Wardell stated that

> I have reviewed the records you sent me which Dr. Holden had in his possession when he performed his Independent Medical Examination. Based on review of these records, I think that Mr. Sutton had a preexisting sciatica which was permanently aggravated by his injury of January 20, 1997. [ITOX 8].

On reexamination by Dr. Holden in October 1998, Sutton reported that he had global pain around the right heel and big toe, as well as back pain.

The physician reported that

> In reviewing records the patient had chronic back complaints before the injury to his foot and broken toe. Based on the studies after the injury showing no evidence of any ruptured disc “or” EMGs that are normal, I find no evidence of any acute injury to the back. In my judgement, whatever Mr. Sutton's

> back complaints are today have been there in the past and are related to his pre-existing condition and not to the job incident of January 20, 1997.
>
> The injury to the right toe could possibly have aggravated his lack condition due to abnormal gait for the duration of the time that it took for the toe to heal which is approximately four to six weeks. After that gait abnormalities would have been returned to pre-injury state and would no longer be a factor and aggravation to his back. I do agree that he is back to his January 20, 1997 preinjury status. I also find that there is no atrophy of his calf and his right calf is larger than his left and his gait is normal showing no favoritism in gait, no evidence of disuse dysfunction. There would be no disability from the fractured toe. The patient does suffer from hallux valgus which can be symptomatic and would affect any functional capacity examination in itself. Because functional capacity evaluations cannot separate out individual injuries but only evaluate the whole his hallux valgus deformity could affect the FCE (functional capacity evaluation).
>
> My only other comment is that this patient has the most severe positive Waddell sign which is neurological deficits, stopping in the midline, to sensory deprivation on a clinical basis. This is strong evidence of a cerebral manipulation of the exam for whatever purpose the patient consciously or unconsciously is attempting to gain. In and of itself the sensory exam discredits the patients complaints as a whole and cannot be trusted. It should be noted during the exam the patient had full extension and flexion of both knees. I noticed that he was given disability for his right knee in the past. That has corrected itself. The patient should be returned to work at the level that he was qualified to work at prior to January 20, 1997. [CTSX 1].

Dr. Neff saw Sutton in July 1998 and in January 1999. In March 1999, Dr. Neff stated that he agreed with the contents of a letter written by claimant’s counsel. Counsel’s letter stated in part

1. That when you first examined Mr. Sutton on July 23, 1996 you found that he had "definite right buttock atrophy and positive right straight leg raising for thigh and right calf pain"

2. That in your opinion, this right buttock atrophy is an objective finding consistent with sciatic problem;

3. That based on this finding and the other findings of your examination, you determined that Mr. Sutton was suffering from a right sciatica problem which you attributed to Mr. Sutton's May 17, 1996 injury;

4. Furthermore, it was your opinion that this right buttocks atrophy which you found on July 23, 1996 was a result of the claimant's injury of May 17, 1996;

5. That an EMG was performed at your request by Richard Neilson on July 9, 1995, which was positive for sciatic problem. [ITOX 6].

In February 1999, Dr. Wardell stated that

> I have reviewed the records of Dr. Neff's treatment of Bobbie Sutton after a right knee injury in 1998. I have also reviewed electromyography reports performed at Dr. Morales office and at Mr. Neilson's office, as well as reviewed the EMG's performed at our office on March 5, 1997 and June 17, 1998. Although Mr. Sutton incurred symptoms of right sciatica after the 1995 automobile accident, there was objective evidence of worsening of his sciatica based on EMG findings after the right knee injury. His subsequent foot injury for which I treated him aggravated his right sciatica but this aggravation has subsequently resolved. He, however, has permanent aggravation of his sciatica as a result of his right knee injury. Due to his sciatica, he should be on full back restrictions. [ITOX 8].

Dr. Neff saw Sutton in April, in July, and in September of 1999. In October 1999, the physician wrote to claimant’s counsel and stated that

I am writing to you concerning a meeting which we had on January 28, 1999 concerning my treatment of Mr. Bobbie Sutton. As per my discussions and opinions to you concerning Mr. Sutton's evaluation and treatments, I am of the opinion that, when I first evaluated Mr. Sutton on July 23, 1996, I found atrophy of his right buttock and a positive right straight leg raising test for thigh and right calf pain. It was my opinion that the rather marked right buttock atrophy was an objective finding which was consistent with his right sciatica and, furthermore, that the right sciatic irritation which I found was directly attributable to Mr. Sutton's May 17, 1996 accident. The buttock atrophy was a direct result of the May 17, 1996 accident.

An EMG/nerve conduction study was performed, at my request, by Dr. Richard Neilson on July 9, 1996 for residuals of this accident. The EMG was positive for right sciatica. When the EMG was repeated on August 19, 1996, it was again positive for sciatic problem in that it showed increased exertional activity from the medial gastrocnemius muscle. Because of this right sciatica, I referred Mr. Sutton to Dr. Richardson, a neurologist. It was Dr. Richardson's opinion that the right sciatic problem was not resulting in a neuropathy and that further treatment was therefore not necessary. The fact that Dr. Richardson did not opine that the sciatic problem was not resulting in a neuropathy did not change my opinion that Mr. Sutton suffered a sciatic nerve injury on May 17, 1996.

When Mr. Sutton sustained a new injury on January 20, 1997 and came back to my office, it was my clinical impression that the sciatica which he was having at that time was being treated by Dr. Arthur Wardell. I, therefore, did not address the issue on that date and have not treated Mr. Sutton for sciatica since having seen him subsequent to the new injury on January 20, 1997. [ITOX 6].

In December 1999, Dr. Wardell stated that

Because of Mr. Sutton's right leg and low back injury sustained on 1-20-97, he cannot stand more

> than one hour per day or sit longer than one hour per day. Because of these restrictions, he cannot work longer than two hours per day unless he can lie down at work. (ITOX 8).

Dr. Pugach, a neurologist reviewed records in January 2000 and stated

> Therefore, I would conclude, taking all the data into consideration, that Mr. Sutton either had no nerve injury, or he had a relatively mild injury to the distal right sciatic nerve, causing some rather limited acute denervation changes in appropriate muscles - and that if there was any degree of sciatic nerve injury, this had certainly completely resolved by the time the patient was evaluated by Dr. Kirk on September 13, 1996. (ITOX 11).

On examination in February 2000, Sutton informed Dr. Pugach that

> His current symptoms include a feeling of pins sticking in his right heel, which is constant, although worse if he stands on it. If he stands for more than a few minutes, pain will radiate up his right leg. He admits to numbness and tingling on the bottom of the right heel, but denies any other such paresthesias. He does say that if he turns his right foot outward the heel pain increases. He admits to weakness in the right lower extremity, saying that it affects the entire extremity. He says he has been walking with a cane since injuring his knee and wearing a knee brace in the last two or three months. He has had a few right knee steroid injections, the last some time this past December.
>
> He denies any history of back injury, but admits to sharp pains in his lower back at times. He gives the example of any lifting causing this. He denies any symptoms in his left lower extremity similar to those in the right. He also denies bowel or bladder dysfunction.

Dr. Pugach reported

IMPRESSION AND RECOMMENDATIONS: As noted in my prior report of January 23, 2000, the available records suggest that the patient may have had some transient dysfunction of his distal right sciatic nerve, which had resolved by the time he had his EMG on September 13, 1996. Based on today's evaluation, I do not find any indication that the patient has had any other neurological injury related to the May 16, 1996 injury. His subjective complaints are predominantly pain throughout the right lower extremity, mostly in the ankle, related to the ankle injury, and paresthesias around the right heel, but not elsewhere. The only "objective" findings on my exam include a positive right straight raise and diffuse decreased pinprick and light touch sensation throughout the entire right leg. From a medical standpoint, these are rather subjective findings and the sensory deficit is non-anatomical.

Dr. Pugach concluded stating that

I do not believe that there is any neurological deficit at this time and any deficits he may have in the right lower extremity would be musculoskeletal in nature. I would defer any further comment on this to an orthopaedist. Therefore, there is no neurological diagnosis and no disability from a neurological standpoint. (ITOX 17).

Dr. Williamson, an orthopedist, examined Sutton in early May 2000. Following the evaluation the physician stated that

In response to specific questions as they relate to the injury of 5/17/96.

1. The objective findings are none. He has normal range of motion of his back. He has a negative straight leg raise. He has non-dermatomal 50% decreased sensation on the entire right side of his body excluding his face. He has a normal knee exam, other than some mild lateral laxity unrelated to his incident.

2. He has patellofemoral crepitus (unrelated to the accident). He has continued medial joint line

tenderness (unrelated to the accident as his tear was on the lateral side and the degenerative changes were patellofemoral and medial).

3. The subjective complaints are that of pain. Pain in the knee(different than that after the accident). Pain in his back (not noted for several months after the accident).

4. There is a discrepancy with the patient's subjective complaints and his physical findings are none. His subjective complaints are numerous.

5. His present orthopaedic status is that degenerative arthritis of his knee (unrelated to the accident). Status post arthroscopic lateral meniscectomy, which has healed and carries a permanent impairment as stated by Dr. Neff. Chronic low back pain with negative MRI scanning and negative electromyographies, but again, this is subjective.

Diagnosis:

1. Status post lateral meniscectomy (related).

2. Medial joint line degenerative arthritis of the knee with patellofemoral involvement (unrelated to the accident).

3. Chronic back pain by subjective complaints.

In my opinion, the patient is not disabled in an orthopaedic standpoint due to his injury. His subjective complaints however make it difficult to function. These are all based on subjective statements not by any physical findings of documented pathology. It is my opinion that his condition has no relationship to the work injury dated 1996. His continued knee complaints are on the opposite side of the knee more referable than medical probability to the degenerative changes. The low back pain did not show for several months after the incident and therefore I do not believe there was a back injury at all. IF he did have some minor back pain, this would be a very minimal back

> strain (mechanism and no documentation of injury). This mild back strain would in medical probability would resolve itself within six to eight weeks. His chronic back pain in my opinion now is unrelated to that incident. (ITOX 19).

In mid May 2000, Dr. Williamson reported that

> Mr. Sutton sustained an injury in May of 1996 (presumably from ITO) and that injury is not responsible for any apparent low back pain. (ITOX 20).

At the hearing, Dr. Pugach testified that reflexes were objective findings and that tenderness, weakness, and sensory abnormalities were considered to be subjective. (TR 78). The physician had reviewed the EMGs and NCV tests and concluded that there was no neurological diagnosis or reason for restrictions. There was a history of injury to a nerve behind the knee when there was trauma to that joint.

When deposed in August 2000, Dr. Neff testified that Sutton was first seen in June 1996 and findings related only to the right knee. Positive straight leg raising was noted on the next evaluation and there was a suspicision of sciatic nerve irritation. The back was essentially normal but there was atrophy of the right buttock.

Dr. Neff reviewed Dr. Morales' records and found no indication of sciatic nerve abnormality. Later examinations in 1996 did not reveal sciatic nerve abnormality and Sutton was returned to full duty in January 1997. In February, Sutton reported the injury to the right foot and complained of back pain.

Dr. Neff felt that Sutton had a sciatic nerve injury in 1996 although significant back complaints did not begin until after the 1997 injury. The physician noted that Dr. Wardell provided treatment for the back impairment. (ITOx 28).

Dr. Wardell was deposed in September 2000 and testified that in January 1997, diagnoses included possible right sciatica although Sutton did not report back complaints. An EMG was abnormal and epidural and facet injections were provided. Sutton reached MMI by September 22, 1997 although he neer had full range of spinal motion.

Dr. Wardell stated that Sutton aggravated a preexisting condition when he twisted his back in January 1997. (ITOX 29, p. 19). The physician reaffirmed his opinion in ITOX 8.

When asked

> Do you have an opinion on whether or not Mr. Sutton's back and/or sciatic condition would have been the same on September 22, 1997 with or without the January 20th, 1997 injury?, Dr. Wardell stated that
>
> > I think it would have been the same. From an electro diagnostic standpoint, it was — it was the same. And just talking to him historically about his -- his symptoms, it was about the -- about the same. (ITOX 29, P. 24).

Dr. Wardell stated that his opinion now was as he stated in February 2000. (In CX 3, p. 1, The physician reported that

> I have read your letter and talked to Laura Whitfield (a vocational consultant). I have reviewed my chart. It does seem that I have said in previous communications that Mr. Sutton's right sciatica was aggravated by the 1-20-97 injury, but that aggravation had subsequently resolved.
>
> The letter to Mr. Camden dated December 21, 1997 is correct in limiting Mr. Sutton's work capabilities, but these restrictions are due to his May 17, 1996 injury as well as his January 20, 1997 injuries. He has permanent restrictions due to the injuries sustained in January 20, 1997 referable to his ankle and foot. (See CX 3, p. 14, dated 11/20/98 for these restrictions).

Contentions regarding extent of disability, and liability of the employers

Sutton argues that the Section 20(a) presumption applies regarding a low back impairment and states that Dr. Neff relates such a disorder to the injury in 1996. The claimant could not have continued to work in 1997 even if the second

injury had not occurred. Dr. Wardell has stated that the sciatica was aggravated by the 1997 injury. It is argued that Sutton can not return to previous work and he is incapable of performing suitable alternate employment.

ITO argues that the presumption is rebutted as Dr. Wardell's statements regarding back disability are unsupportable. Drs. Williamson, Holden, and Pugach dispute the conclusion of Dr. Wardell.

Alternately, ITO argues that if Sutton is totally disabled, Cooper is responsible as Dr. Wardell has stated that the impairment was aggravated by injuries in January 1997. Natural progression has not been shown as Dr. Neff has stated that there were no low back restrictions in early January 1997.

Cooper/T. Smith argues that only Dr. Wardell indicates that Sutton has a chronic back impairment. If such a disorder was present then Cooper would note that

> Dr. Pugach, Dr. Williamson and Dr. Neff had no opinion with regard to the impact of the 1997 injury. Dr. Wardell, the treating physician, testified without contradiction that he believed the 1997 injury caused a temporary aggravation of the back problem which had resulted from the 1996 injury. Dr. Wardell's testimony is corroborated by the opinion of Dr. Holden who also agreed that Claimant's back problems pre-existed his 1997 injury, which caused a temporary aggravation, at most. This uncontradicted medical testimony establishes that Cooper/T. Smith is not responsible for Claimant's ongoing disability, if any, and that any disability is solely related to Claimant's 1996 I.T.O. work injury.

Discussion

In determining whether the employee has sustained an injury compensable under the LHWCA, one must consider the relationship between Section 2(2) and 20 (a) of the LHWCA. Section 20 (a) establishes a presumption of injury in favor of the claimant if he establishes the elements of prima facie

case. In the absence of substantial evidence to the contrary it is presumed that the injury claim comes under the Act.

In order to be entitled to the statutory presumption, the employee must first establish a prima facie case. The claimant has the burden of establishing that 1) he sustained physical harm or pain; and 2) an accident occurred in the course of employment, or conditions existed at work which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

Once Claimant has met this dual burden or establishing that he has suffered harm and that the alleged accident in fact occurred or the alleged working conditions existed, the Section 20(a) presumption of casual connection (that the harm was caused by the accident or working conditions) applies. The presumption thus operates to link the harm with the injured employee's employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981).

The record clearly reflects that Sutton was injured on three occasions in the mid-1990s. The first question is whether or not there is a chronic back disorder which could have resulted from or have been aggravated by events with the two employers.

While statements from Dr. Wardell are contradictory one could perceive that this physician had related chronic back disability to one or both of the work injuries. Therefore, the Section 20(a) presumption is invoked.

Once the §20(a) presumption applies, the relevant inquiry is whether Employer succeeded in establishing the lack of casual nexus. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). Employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on more hypothetical probabilities in rejecting a claim is contrary to the presumption created in §20(a). Steel v. Adler, 269 F. Supp. 375 (D.D.C. 1967). See also Smith v. Sealand Terminal, Inc., 14 BRBS 844 (1982); Dixon v. John J. McMullen and Associates, Inc., 13 BRBS 707 (1981). Highly equivocal evidence is not substantial and will not rebut the presumption. Dewberry v. Southern Stevedoring Corp., 7 BRBS 322 (1977), aff'd mem., 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978).

Dr. Morales treated the claimant for complaints of low back pain following the automobile accident in 1995. However, the physician did not report chronic back disability when Sutton was released to work for ITO. Drs. Pugach and Williamson have examined Sutton subsequent to 1997 and both physicians have stated that a chronic low back impairment is not present.

In view of these opinions I conclude that the Section 20 (a) presumption has been rebutted and that this administrative law judge must weigh all the evidence and resolve the case on the record as a whole.

> Under the substantial evidence rule, the administrative law judge's findings must be based on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See DelVecchio v Bowers, 296 U.S. 280 (1935).

While Drs. Morales, Pugach, and Williamson have indicated that there is no permanent lumbar impairment, Drs. Neff, Wardell, and Holden have stated otherwise. However, these last three physicians have expressed conflicting opinions as to the onset and the nature of existing impairment.

In late 1997, Dr. Holden stated that a sciatic nerve injury resulting from events in 1995 caused Sutton to fall in 1996. [CX 11]. In 1998, this physician was not specific as to the current level of impairment but indicated that the disability was no more than had been shown prior to the injury in 1997. [CTSX 1].

In June 1996, Sutton complained of right thigh pain and Dr. Neff noted buttock atrophy. The physician suspected radiculopathy but this was ruled out by Dr. Richardson. In early 1997, Dr. Neff referred Sutton to Dr. Wardell who treated the recent injuries. [CX 4; ITOX 6]. Dr. Neff later testified that while there was a sciatic nerve injury in May 1996, there was no active sciatic problem as of early January 1997. [ITO EX 28].

Dr. Wardell provided the primary treatment following the injuries in early 1997. In May 1998, the physician stated that based on a review of Dr. Holden’s records

> I think that Mr. Sutton had a preexisting sciatica which was permanently aggravated by his injury of January 20, 1997.

In July 1998, Dr. Wardell reported that

> Mr. Sutton does not have a disc herniation. His EMG's are negative, so he does not have significant nerve damage in the lower extremity, but has ongoing sciatic nerve irritation. It is possible that Mr. Sutton's back pain is made worse by an altered gait pattern as a result of his preexisting knee injury. I do not anticipate that Mr. Sutton will return to full work duty.

In November 1998, the physician stated that

> as far as his right sciatica is concerned, from an objective basis, he has returned to his pre-foot injury state with regard to his sciatica.

Dr. Wardell reported in February 1999 that

> Although Mr. Sutton incurred symptoms of right sciatica after the 1995 automobile accident, there was objective evidence of worsening of his sciatica based on EMG findings after the right knee injury. His subsequent foot injury for which I treated him aggravated his right sciatica but this aggravation has subsequently resolved. He, however, has permanent aggravation of his sciatica as a result of his right knee injury. Due to his sciatica, he should be on full back restrictions.

A report on December 21, 1999 indicated that

> Because of Mr. Sutton's right leg and low back injury sustained on 1-20-97, he cannot stand more than one hour per day or sit longer than one hour per day. Because of these restrictions, he cannot work longer than two hours per day unless he can lie down at work.

In February 2000, Dr. Wardell stated that

> It does seem that I have said in previous communications that Mr. Sutton's right sciatica was aggravated by the 1-20-97 injury, but that aggravation had subsequently resolved.
>
> The letter to Mr. Camden dated December 21, 1997 is correct in limiting Mr. Sutton's work capabilities, but these restrictions are due to his May 17, 1996 injury as well as his January 20, 1997 injuries. He has permanent restrictions due to the injuries sustained in January 20, 1997 referable to his ankle and foot. [ITOX 8].

During the deposition in September 2000, the following discourse occurred between Dr. Wardell and counsel for ITO.

> Q So the December 21, 1999 letter to Mr. Camden, which we referred to at the beginning of the deposition, wherein you said, Because of Mr. Sutton's right leg and low back injury sustained on 1-20-97, he cannot stand more than one hour per day or sit more than one hour per day, because of these restrictions he cannot work longer than two hours per day unless he can lie down at work, does that letter suggest that there was a permanent or a temporary aggravation because of the the 1-20-97 injuries?
>
> A That -- the way I read that -- that letter is that there -- there -- I say because of his right leg and low back injuries sustained on 1-20-97 he cannot do the following things. But -- but that's actually due to the -- the injury he had prior to that.
>
> Q So you're changing the 12-21-99 letter?
>
> A Yes.
>
> Q Even though when I asked you earlier today if you had changed that opinion you said no? [ITOX 29, p. 43].

The undersigned has tried to rationalize the comments from Dr. Wardell. This physician did not treat Sutton until after the injury in 1997 but states that present lumbar spine abnormality is due to prior injuries. In addition, Dr. Wardell is not specific as to a diagnosis or as to the reasons for restrictions associated with the low back.

The undersigned concludes that none of the physicians has clearly delineated that there is a chronic lumbar impairment regardless of origin.

Suitable Alternate Employment

The parties have stated that if there is a chronic low back impairment the claimant is totally disabled. The undersigned has found that a chronic lumbo sacral impairment does not exist.

Alternately, the two employers have argued that if a low back disorder is not present, the claimant has been paid full benefits under Potomac Electric Power Company v. Director, OWCP (PEPCO), 449 US 268 (1980), as Sutton is able to perform other work.

The claimant argues, alternately, that even if there is no chronic back disorder, the work related injuries and intellectual limitations prevent his return to employment.

In April 2000, Oliver Vipperman, a vocational consultant, evaluated the claimant. The WRAT revealed a first grade level in reading, spelling, and arithmetic. Clinical data indicated that Sutton could only perform sedentary work.

Vipperman thought that Sutton could work as a toll taker but might have difficulty in completing the paperwork. [ITOX 23]. In May Vipperman stated that

> Therefore, based on my survey in the Tidewater Virginia area I have been unable to identify any viable occupational alternatives that would be suitable for this claimant in light of his education, training, experience, and physical capacity. Therefore I feel this survey must be

considered as negative in nature to the account. [ITOX 24].

Charles DeMark, a vocational consultant, has submitted reports which are contained in CX 16-18 and ITOX 25 and 26. DeMark testified that his testing reflected slightly better results than those reported by Vipperman.

Attention was called to CX 3-15, Dr. Wardell's restrictions for the back, and to CX 3-14 that physician's restrictions for the leg. DeMark stated that even if the leg allowed Sutton to work at a light to medium level Sutton could not work as a longshoreman or find other work due to his limitations.

Laura Whitfield, a vocational consultant, conducted a labor market survey in early 1999. She identified jobs as an unarmed security guard, as an assembler, and as a delivery driver. Dr. Holden approved jobs with Glass Baron, Security Forces, Inc., Clemons Security, Lee Staffing/Cork, Crown & Seal, with Atlantis Photo, and with Bayview Plaza Pharmacy.

Whitfield spoke with Dr. Wardell and the physician approved working as a forklift driver on the dock, with Glass Baron, at one gasoline station, and with Security Services.

Drs. Neff and Wardell were deposed subsequent to the hearing.

The undersigned has no reason to doubt Ms Whitfield when she states that she talked to Dr. Wardell and that he approved some of the jobs. However, the record does not contain the physician's signature as to the approval of jobs, and no mention of jobs was made at the deposition.

Approval of such jobs does not seem consistent with previous statements by Dr. Wardell.

While Dr. Holden, who examined Sutton on one occasion, approved some jobs, all three vocational experts noted illiteracy, and Vipperman and DeMark stated that Sutton was unemployable.

It is concluded that suitable alternate employment has not been shown and that Sutton is totally disabled. The

finding is based on right lower extremity and intellectual impairments, as substantiated by vocational evidence.

Cooper/T. Smith is the responsible employer as Sutton could work until the date of the last injury.

Entitlement to Section 8(f) Relief

An employer may invoke Section 8(f) of the Act to limit its liability for compensation payments for permanent disability. To recover payments for permanent partial disability under this provision, the employer must establish the following: (1) the employee had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer prior to the work-related injury; (3) the subsequent work-related injury alone would not have caused the employee's ultimate permanent disability; and (4) the ultimate permanent partial disability is materially and substantially greater than.that which would have resulted from the subsequent injury alone." See Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., (Harcum), 8 F.3d 175, 185 (4 th Cir. 1993). The employer bears the burden of proving that its Section 8(f) claim satisfies each of these elements. See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Langley), 676 F.2d 110 (4th Cir. 1982).

In September 1998, counsel in the Office of the solicitor stated that

> In the event the Administrative Law Judge assigned the case determines that there is a compensable permanent disability, the Director agrees to payment by the Special Fund. Payment is to commence 104 weeks after the date the evidence establishes that Mr. Sutton reached maximum medical improvement. However, if a schedule award of less than 104 weeks is entered or a nominal award is entered Section 8(f) relief would not be warranted.

Sutton has not worked since January 1997, and on September 22, 1997 Dr. Wardell stated that the claimant had reached maximum medical improvement, but should stay out of work.

Thus, Section 8(f) relief should apply 104 weeks subsequent to September 22, 1997.

ORDER

1. ITO is to pay temporary total disability as stated in the ITO stipulation #7.

2. Cooper/T. Smith is to pay temporary total disability from January 21, 1997 through September 21, 1997, and pay permanent total disability subsequent to that date.

3. Upon the expiration of 104 weeks after September 21, 1997 such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. §944.

4. ITO is to provide treatment for the right knee impairment.

5. Cooper/T. Smith is to provide treatment for impairment below the right knee.

6. Each employer shall receive credit for payments made.

7. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v Portland Stevedoring Co., 16 BRBS 267 (1984).

8. All computations are subject to verification by the District Director.

9. The Claimant's attorney shall within 20 days of the receipt of this order, submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia